IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 1014

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents.

RESPONDENTS' BRIEF

COUNTER-STATEMENT OF FACTS

Respondents feel that petitioners have neglected to state, and/or have inaccurately stated so many relevant and material facts, a Counter-Statement of Facts is justified. The nature of the litigation and a partial history of the proceedings which have taken place have also been set forth heretofore in *Green v. Green,* 218 F. 2d 130, cert. denied 349 U.S. 917, 948; *Green v. Green,* 233 F. 2d 642; and *In re Green,* 8 Ill. App. 2d 264, appeal denied 7 Ill. 2d.

James A. Green, husband of Martha Green, died testate on November 2, 1935, leaving a will wherein he bequeath-

ed a life estate in all his property to his wife, with power to sell and dispose of the same as she thought best, provided it was done with the consent of Herschel S. Green, designated Trustee (Printed Record on Appeal No. 11124, p. 11-14; No. 670 U.S. Supreme Court, October Term, 1954). His will was subsequently probated in the County Court of Crawford County, Illinois, and on May 22, 1939, the Estate of James A. Green was closed, the residue assigned, and the Executor, Herschel S. Green, discharged.

On February 23, 1938, Herschel S. Green entered into a written Agreement with Martha Green, his mother, which agreement pertained to the management of her individual property, and her life estate in the property of her deceased husband, James A. Green, of whose estate Herschel S. Green was then both Executor and Testamentary Trustee, "*for the purpose of farming and stock raising for said second party* (Martha Green). (Printed Record on Appeal No. 11124, p. 15, 17, 40-44. The aforesaid agreement further recited that Herschel S. Green was to be paid $200.00 per month as manager of said properties, and in case of the death of Martha Green whatever thereof remained unpaid was to be a claim against the estate of said James A. Green and Martha Green, or each estate separately (Record Appeal No. 11124, p. 43, par. 3).

At the time of his death, James A. Green, in addition to other lands, owned 10 and 1/2 eighteenth's of 286 acres of farm land, commonly known as Farm #3. The remaining 7 and 1/2 eighteenth's of such farm was owned by the Crawford County State Bank of Robinson, Illinois, and the First National Bank of Anapolis, Illinois.

On October 5, 1938, the aforesaid 7 and 1/2 eighteenth's of Farm #3 was acquired through the medium of executing a mortgage on the entire farm and using the avails.

and no other money, to pay for such 7 and 1/2 eighteenth's (Record Appeal No. 11124, p. 54-55). Such transaction was then approved by Herschel S. Green in his then capacity of Testamentary Trustee of the Estate of James A. Green, Deceased, in accordance with the provisions contained in the aforesaid will of James A. Green. Title to such 7 and 1/2 eighteenth's interest was taken in the name of *Herschel S. Green, Trustee under the Last Will and Testament of James A. Green, Deceased*, and such deeds were subsequently recorded (Nos. 0-1368 and 0-1369 Crawford County Records).

Both Herschel S. Green and MADGE GREEN each claim to individually and personally own a one-third (1/3) undivided interest of the aforesaid 7 and 1/2 eighteenth's of 286 acres of land, antagonistic to the claims of plaintiffs and respondents who claim only as trust beneficiaries (Petition for Writ of Certiorari, p. 6, 7; Printed Record on Appeal No. 11124, p. 28, No. 670 U.S. Supreme Court, October Term 1954).

On April 9, 1942, Martha Green died testate. Her will with provisions similar to that of her deceased husband bequeathed her individual estate to Herschel S. Green IN TRUST, the net income of which was to be paid in equal shares to her two sons, Oscar L. Green and Herschel S. Green, for life. In event either son died, his portion of such net income was to be paid to his children, if any, and upon the death of both sons, the estate was to be divided equally between the children. A codicil to such will provided that in event either son died without children surviving, his widow, if any, was given a life estate in the aforesaid net income payable to her deceased husband until she remarried or died. *(Green v. Green,* 218 F. 2d 130, 132).

On April 23, 1942, Herschel S. Green transferred the entire bank account of Martha Green, Deceased, to a new bank account in his name as TRUSTEE, and thereafter all the receipts and disbursements concerning the Estate of Martha Green, Deceased, as well as all the receipts and disbursements concerning the Estate of James A. Green, Deceased passed through such trustee's bank account, and no other account.

On May 2, 1942, Herschel S. Green filed the will of Martha Green, Deceased, for probate in the County Court of Crawford County, Illinois, and on July 9, 1942 letters testamentary were issued by said court to Herschel S. Green, as Executor, to serve without bond.

On August 25, 1942, Herschel S. Green, as executor, filed a verified inventory of said estate, listing 129 acres of farm land and personal chattel property valued at $11,-942.00, together with certain promissory notes declared to be of doubtful value. On January 11, 1943, within the statutory limitation for filing claims, Herschel S. Green elected to file a personal claim of $7,174.60 against said estate for services alleged to have been performed by him in accordance with the aforesaid agreement, dated February 23, 1938. Such personal claim, the only claim then filed was thereafter never noticed for hearing, continued from term to term, or heard prior to May 17, 1957 when such claim was heard and disallowed by said County Court Appendix hereto p. 33-35).

On July 13, 1949, Oscar L. Green filed a petition in the Circuit Court of Crawford County, Illinois, seeking an order requiring Herschel to file an accounting as trustee under the will of Martha Green. This petition was entitled "In the Matter of Herschel S. Green, Trustee under the Will of Martha Green, Deceased." No parties to the suit

are named except Oscar and Herschel. Summons was served on Herschel, the trustee, on July 19, 1949, and thereafter he filed a series of reports entitled, "In the matter of Herschel S. Green, Trustee of the Estates of James Green, deceased, and Martha Green, Deceased", which reports indiscriminately combined, without designation, all of the assets of the two estates and the income and expenditures thereof.

On November 8, 1951 and January 9, 1952 respectively, the Complaint and Amended Complaint was filed in the District Court.

On October 27, 1952, immediately after a preliminary hearing in the District Court, Herschel S. Green voluntarily resigned as Testamentary Trustee of both aforesaid trust estates, and both defendants agreed to appointment of a successor-trustee (*Green v. Green*, 218 F. 2d 130, 134). Thereafter Herschel S. Green filed verified accounts in the District Court, as trustee of both trust estates, April 9, 1942 to October 27, 1952. And, the defendants thereafter, also made successive motions to dismiss the case upon the proposition that there was a prior suit for accounting by Oscar L. Green, one of the plaintiffs, and Herschel S. Green, one of the defendants, then pending in the Circuit Court of Crawford County, Illinois, and Herschel S. Green was also acting as Executor of the Estate of Martha Green, Deceased, in the aforesaid County Court, and for these reasons the District Court had no right to assume jurisdiction of the case (Printed Record on Appeal No. 11124, p. 97-108, No. 670 October Term, 1954, United States Supreme Court). Defendants further contended that Madge Green, who was aligned as a defendant in the District Court, was properly a party plaintiff, and being a resident of Illinois, there was no jurisdiction based on diversity of citizenship.

On December 20, 1954, on appeal, the United States Court of Appeals held there was diversity of citizenship and the pendency of the proceedings in the Circuit and County courts of Crawford County, Illinois, in relationship to the Estate of Martha Green, Deceased, did not stay the jurisdiction of the District Court, and that court had the right to proceed with the case pending before it (*Green v. Green*, 218 F. 2d 130, cert. denied 349 U.S. 917, 948).

On March 8, 1955 and May 18, 1955 respectively, after the Opinion of the United States Court of Appeals had been rendered, and while defendants' first petition for a writ of certiorari was pending, Herschel S. Green filed a request for construction of wills and for instructions and for Injunction in the Circuit Court of Crawford County against Oscar L. Green and the other plaintiffs to prevent their further proceeding in the District Court. On the same day, the Circuit Court of Crawford County issued such Injunction without notice and without bond. Thereafter, Plaintiff Oscar L. Green appealed to the Illinois Appellate Court for the Fourth District from an order denying a motion to dismiss and to quash said injunction.

On May 25, 1955, the District Court entered a preliminary injunction against defendants, enjoining them from further proceeding in the Circuit Court of Crawford County.

On June 14, 1955, defendants filed a motion to vacate the aforesaid injunction and on August 10, 1955, after the District Court denied the aforesaid motion, and referred the case to a Master in Chancery, defendants filed a Notice of Appeal. On September 29, 1955, after the District Court refused supersedeas, the United States Court of Appeals for the Seventh Circuit also denied the motions of defendants for a supersedeas and stay of proceedings.

On the second appeal, defendants again contended that the District Court had no right to assume jurisdiction of the case because of the pending action in the Circuit Court of Crawford County; that Herschel S. Green was acting as Executor of the Estate of Martha Green, Deceased, in the said County Court; and that the District Court lacked jurisdiction based on diversity of citizenship.

On December 22, 1955, the Illinois Appellate Court for the Fourth District rendered its Opinion, holding that the Circuit Court of Crawford County erred in refusing to dismiss the proceedings in that court, and in issuing its aforesaid injunction, and reversed the decree of the Circuit Court in all respects and quashed its writ of injunction. *In re Green,* 8 Ill. App. 2d 264, appeal denied 7 Ill. 2d.

On May 3, 1956, the United States Court of Appeals rendered its Opinion, holding that the District Court had exclusive prior jurisdition *in rem* of the Trust Estates of James A. Green, Deceased, and Martha Green, Deceased; that the proceedings in the County Court of Crawford County did not stay the proceedings in the District Court; the question of diversity of citizenship had been disposed of on the previous appeal and was closed to further consideration; and that all of the issues raised by defendants were without merit. *Green v. Green,* 233 F. 2d 642.

On July 6, 1956, the Master in Chancery appointed by the District Court, after 12 days of hearings, filed findings of fact and conclusions of law that Herschel S. Green, as Trustee, had wrongfuly transferred to himself all of the net income of both said testamentary trust estates, April 9, 1942 to October 27, 1952, amounting to $76,838.68, less certain credits and $793.74 paid his co-beneficiary, Oscar L. Green, and that he should be permanently removed as trustee of both estates for good cause. The said Master in

Chancery further found and concluded that Herschel S. Green was indebted to Oscar L. Green in the sum of $22,804.61, with interest at 5% per annum from October 27, 1952, and that defendants did not personally own any of the real estate involved in this suit.

On July 16, 1956, upwards of 14 years after he filed the aforesaid inventory on August 25, 1942, during which time Herschel S. Green performed no act as Executor of the Estate of Martha Green, Deceased, he filed a Supplemental Inventory in said County Court, as Executor, listing only an undivided one-third (1/3) interest in the aforesaid 7 and 1/2 eighteenth's of 286 acres of land, purchased as aforesaid.

On August 2, 1956, the District Court entered its Order, Judgment and Decree sustaining and adopting the aforesaid Report of the Master in Chancery, decreeing, among other things, the aforesaid sum due Oscar L. Green, and that the aforesaid 7 and 1/2 eighteenth's interest of 286 acres of land, purchased from the two banks, to be owned by the Estate of James A. Green, Deceased. No timely appeal was ever taken from such Order, Judgment and Decree.

On August 29, 1956, Herschel S. Green filed a personal claim of $40,512.21 against the Estate of Martha Green, Deceased, for services alleged to have been performed by him prior to the death of Martha Green in accordance with the aforesaid agreement dated February 23, 1938.

On November 8, 1956, the District Court entered its Order determining and providing for the payment of plaintiff'st attorney fees and necessary costs and expenses of litigation. No timely appeal was ever taken from such order.

On November 23, 1956, Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, filed an Amended Inventory of such estate in the aforesaid County Court, upwards of 14 years after he filed his original inventory, listing the same chattel property previously listed, stating therein, "*Inventory of personal property and livestock, owned one-half interest each by Martha Green and Herschel S. Green, and used in their joint venture of farming and livestock raising on March 4, 1942, just prior to the death of Martha Green on April 9, 1942.*" The total value of such property was indicated as being $18,387.71, whereas the same chattel property inventoried in 1942, as aforesaid, was then appraised at $11,942.00 by appraisers appointed by said County Court.

On November 28, 1956, defendants filed a Motion for Relief From Judgments and Orders entered by the District Court, on August 2, 1956 and November 8, 1956 respectively, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., alleging that such judgments were void on the ground that a prior suit was pending in the Circuit Court of Crawford County, Illinois; that Defendant Herschel S. Green was also acting as Executor of the Estate of Martha Green, Deceased, which estate was pending in the aforesaid County Court; and that Madge Green, who was aligned as a defendant in the District Court, was properly a party plaintiff, and being a resident of *Illinois*, the District Court had no jurisdiction based on diversity of citizenship.

On December 7, 1956, the District Court entered its Order denying the aforesaid Motion for Relief From Judgment and Order, filed by defendants pursuant to Rule 60(b), and upon the attorneys for defendants offering no objections, after a hearing in open court, accepted the

resignation of C. W. Rains, the Successor-Trustee to Herschel S. Green, appointed by the District Court, and approved his final account.

On December 7, 1956, defendants filed a Notice of Appeal from the aforesaid Order of the District Court denying their aforesaid Motion For Relief From Judgment and Order, and on December 26, 1956, defendants filed a second Notice of Appeal from the Order of the District Court, entered December 8, 1956, denying their motion to reduce the $30,000.00 supersedeas bond on appeal, and the cost bond on appeal from $1,500.00 to $250.00.

On March 27, 1957, the United States Court of Appeals for the Seventh Circuit granted the Motion of plaintiffs to dismiss the aforesaid appeals pending between the parties at that time in that court, and on April 19, 1957, denied defendants' motion for clarification of their prior order.

On May 17, 1957, after a hearing in open court, the County Court In Probate of Crawford County, Illinois, disallowed both of the aforesaid personal claims of Herschel S. Green; ordered the aforesaid Supplemental and Amended Inventories, and all reports filed by Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, stricken; and ordered Herschel S. Green, within 30 days, to file a proper account limited to disclosing his disposition of the assets contained in his original inventory, filed August 25, 1942, as aforesaid (Appendix hereto, p. 33-35).

SUMMARY OF ARGUMENT

The property in question has never been in the custody of the State probate court.

Defendants have never questioned the right of Herschel S. Green, as Trustee of the Estate of Martha Green, Deceased, to sell or dispose of any or all livestock and/or grains in his possession as trustee, or challenge the undeniable fact that he did so on numerous occasions for upwards of ten years.

County courts cannot administer testamentary trusts. Probate courts have no jurisdiction of trust estates, nor of the trustee. In *Illinois*, an executor has no inherent interest in title to, or control over the realty of his decedent, or in the income therefrom. The real estate passes to the heir or devisee, and if a trust is created the property devolves upon the beneficiary of the trust without action of the probate court. In the absence of an insufficiency of personal assets to pay the debts of the deceased, Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, has no more to do with the real estate than a stranger having no connection with the estate.

There has never been any deficiency of personal property with which to pay the debts of decedent. The only two claims filed against the Estate of Martha Green, Deceased, being the personal claims of Herschel S. Green, the Executor of said estate, have been heard and disallowed by the County Court In Probate of Crawford County, Illinois.

Herschel S. Green, nominated both executor and testamentary trustee, without bond, in the Will of Martha

Green, Deceased, by his subsequent conduct unequivocally elected to act in the capacity of testamentary trustee, and not as Executor of the Estate of Martha Green, Deceased.

The characteristic duty of an executor is the settlement of the estate with reference to the situation of the assets at the time of decedent's death. Herschel S. Green, Executor of the Estate of Martha Green, Deceased, was not authorized to continue to operate her farm lands as executor of her estate. Her will imposed no other duty on him but to properly manage her estate as testamentary trustee, and divide the net income thereof equally between himself and Oscar L. Green, his co-beneficiary.

In considering diversity jurisdiction, it should be noted that Madge Green claims to individually and personally own a one-third (1/3) undivided interest in certain of the trust lands antagonistic to the claims of plaintiffs who claim only as trust beneficiaries.

Diversity of citizenship is to be determined by the real interest of the parties in the subject matter of the suit and their sides in the dispute. It is not Madge Green as an individual, but the widow, if any, of either son dying without a child or children surviving him that is designated as contingent remainderman in the codicil of Martha Green to her will. Madge Green, who is not the widow of Herschel S. Green, has a mere intangible, contingent expectancy in the future income, if any, of only the Martha Green Trust. She has no interest whatever in the James A. Green Trust. In *Illinois*, to be an essential necessary party a beneficiary must have a present substantial interest, as distinct from a mere expectancy, or future contingent interest.

Rule 60(b) of the Federal Rules of Civil Procedure was not intended to be resorted to as an alternative to review

by appeal, nor as a means of enlargening by indirection the time for appeal.

A petition to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for abuse of discretion. This is particularly true where the judge passing on the petition has presided over all the litigation and is well known to be experienced and is well acquainted with every fact concerning such litigation since its very inception. And, the defendants cannot, and do not deny that all of the facts and inferences which can be reasonably and naturally drawn from the proceedings had and the evidence therein adduced absolutely warrant the judgments and orders entered by the District Court.

A trust estate may be lawfully required to bear the necessary expenses of its own preservation, including such reasonable attorney fees as were fairly earned in affecting the result indicated by the final decree.

ARGUMENT

I. Illinois county courts in probate have no jurisdiction of trust estates, nor of the trustees. An executor has no interest in title to, or control over the realty of his decedent, or the income therefrom.

Petitioners charge the District Court with interference with property in the course of administration in a State probate court while Herschel S. Green has two personal claims pending (Petition, p. 3, 10). The property in question has never been in the custody of such court. It is property which Herschel S. Green, as Trustee of the Estate of James A. Green, Deceased, and the Estate of Martha Green, Deceased, transferred to his successor-trustee, appointed by the District Court, or chattel property raised and matured on trust lands in the exclusive possession of said successor-trustee.

Petitioners are not concerned with the undeniable fact that Herschel S. Green, as Trustee of the aforesaid estates, between April 9, 1942 and October 27, 1952, as is evidenced by his verified accounts filed in the District Court, upon occasions too numerous to mention, sold similar property. They are not concerned with the fact that shortly after he filed the will of Martha Green, Deceased, for probate, Herschel S. Green unequivocally elected to act as Testamentary Trustee and not as Executor of the Estate of Martha Green, Deceased, and for a period of upwards of 14 years completely ignored the said County Court and performed no one act as such executor. They prefer to conceal the fact that before their "Petition for

Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit'' was mailed to the Supreme Court of the United States to be docketed, they were personally aware of the fact that the two aforesaid personal claims of Herschel S. Green had been heard and disallowed by the County Court of Crawford County, Illinois.

In Illinois, county courts in probate are not courts of general jurisdiction, but their jurisdiction is circumscribed and restrained by the Constitution (Art. 6. sec. 20), and legislative acts which attempt to extend such jurisdiction are violative of the constitution. *Rosen v. Rosen,* 370 Ill. 173; *Howard v. Swift,* 356 Ill. 80; *In re Estate of Shanks,* 282 Ill. App. 1. Although Petitioner Herschel S. Green was nominated and appointed Executor and Testamentary Trustee by the will of Martha Green, Deceased, the power as executor and as trustee is as separate and distinct as if different persons had been appointed to each office. *In re Estate of Busby,* 288 Ill. App. 500, 528; *Wylie v. Bushnell,* 277 Ill. 484. Probate courts have no jurisdiction of trust estates, nor of the trustee. *Hart & Smith v. Dime Savings & Trust Co.,* 214 Ill. App. 553, 556; *Green v. Green,* 218 F. 2d 130, 141, 142.

Although probate courts have exclusive jurisdiction over the personal property, they have no jurisdiction over the real estate unless the personal property is insufficient to pay the debts of the deceased. The real estate passes to the heir and devisee, and if a trust is created the property devolves upon the beneficiary of the trust without any action of the probate court, as effectively as though the legal title were in him. *In re Estate of Mortenson,* 248 Ill. 520, 527. An executor has no interest in title to, or control over the realty of his decedent, or the income therefrom. *Peck v. Landphere,* 238 Ill. App. 567; *Rosen v. Hayes,* 271 Ill. App.

1. In the absence of an insufficiency of personal assets to pay the debts of the deceased, Petitioner Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, has no more to do with the real estate of deceased than a stranger having no connection with the estate. *Dixon v. Nefstead,* 285 Ill. App. 463, 469.

On April 9, 1942, when Martha Green died, Herschel S. Green undeniably immediately assumed exclusive possession of the Estate of James A. Green, Deceased, as Testamentary Trustee. The life estate of Martha Green was ended. After the death of James A. Green, her husband, Martha Green used her power under his will to mortgage certain of his real property, and used the funds so obtained to acquire more real property, which she caused to be added to his estate, as aforesaid, but she did not use her power to sell, dispose of, or exchange any real property belonging to his estate. That which remains after a life estate is ended is no part of the life tenant's estate. *Nott v. Heitman Trust Co.,* 285 Ill. App. 450. Life estates are not subject to the debts of the life tenant after their death. *Talent v. Talent,* 267 Ill. App. 334.

Herschel S. Green was nominated both Executor and Testamentary Trustee in the Will of Martha Green. He filed said will for probate, and on July 9, 1942 letters testamentary, as Executor of the Estate of Martha Green, Deceased, without bond, were issued to him by the County Court of Crawford County, Illinois. On August 25, 1942 he filed a verified inventory of said estate listing personal property valued and subsequently appraised at $11,942.00, plus certain promissory notes declared to be of doubtful value. Thereafter, on January 11, 1943, Herschel S. Green, within the statutory limitation for filing claims, elected to file a personal claim of $7,174.60 against said

estate for personal services alleged to have been performed by him in accordance with a written agreement with his mother to manage her individual farm land, and the farm lands belonging to the Estate of James A. Green, Deceased, in which she had a life estate. Herschel S. Green was then both Executor and Testamentary Trustee of the Estate of James A. Green, Deceased. No other claims were then filed against the Estate of Martha Green, Deceased, and said personal claim of Herschel S. Green was thereafter never presented for hearing, nor continued from term to term, and no hearing was had thereof until May 17, 1957, when the claim was heard and disallowed by said County Court (Appendix p. 33-35).

Under Illinois law, the characteristic duty of the personal representation of a decedent is the settlement of his estate with reference to the situation of the assets at the time of decedent's death. It is no part of the duty of an executor, not authorized as such executor by the will nominating him, to carry on a business conducted by decedent, but, it is, on the contrary, in the absence of express testamentary power, a breach of trust for a personal representative of a decedent to carry on a trade or business on behalf of an estate (Chapt. 3, sec. 366a, *Illinois Revised Stats.*, 1949). Herschel S. Green was authorized by the wills of both James A. Green, Deceased, and Martha Green, Deceased, to carry on the farming business as Testamentary Trustee, but not as Executor. All of the expressions used in both wills impose no other duty on him but to properly manage the trust property as testamentary trustee, and divide the net income thereof equally between Oscar L. Green, his brother, and himself.

It is well settled that executors are not authorized to continue the business of their testators unless it clearly ap-

pears from the will that such is his intention, and if they do so without authority they do it at their own risk. The functions of an executor are to close up the estate for which he is acting. He has no authority, as such officer, to conduct the continued operation of a farm. Such is beyond the scope or functions of his office. *Nonnast v. Northern Trust Co.*, 374 Ill. 248, 259; *In re Estate of Nonnast*, 300 Ill. App. 537, 557; *Chicago T. & Tr. Co. v. Fine Arts Bldg.*, 288 Ill. 142, 149; *Grace v. Seibert*, 235 Ill. 190, 193; *Smith v. Preston*, 170 Ill. 179, 188.

On April 23, 1942, Herschel S. Green transferred the entire bank account of Martha Green, Deceased, to a new Trustee's bank account, and thereafter all the receipts and disbursements concerning her estate, as well as those concerning the Estate of James A. Green, Deceased, passed through such trustee's bank account, and no other account.

Between August 25, 1942, the date he filed the aforesaid inventory, and July 16, 1956, Herschel S. Green completely ignored the aforesaid County Court. He performed no act whatsoever as Executor of the Estate of Martha Green, Deceased. He filed no accounting whatever in the aforesaid County Court until January 28, 1957. And, then the accounts he filed there was an accounting in which the receipts and disbursements of the Estates of James A. Green, Deceased, and the Estate of Martha Green, Deceased, were indiscriminately combined, and such accounts were identical to the verified accounts he had previously filed, as aforesaid, in the District Court as testamentary trustee.

It is crystal clear from all the records and evidence available, such as credit applications, and the verified reports or accounts, which Herschel S. Green filed as Trustee of the Estates of James A. Green, Deceased, and Martha

Green, Deceased, in the United States District Court for the period of April 9, 1942 to October 27, 1952 inclusive, and the indentical reports or accounts he subsequently filed in the said County Court on January 28, 1957, individually and as Executor of the Estate of Martha Green, Deceased, ordered stricken by said County Court (Appendix p. 33-35), that immediately after April 9, 1942, Herschel S. Green, as Testamentary Trustee, resorted to the indisciminate borrowing of money on the assets of the two trusts in his frenzied eagerness to get cash for strictly personal expenditures, rather than wait until such money became available by the sale of matured livestock or grains. He had discovered soon that he could borrow only in the capacity of Testamentary Trustee without the consent of any court, and not as Executor of the Estate of Martha Green, Deceased.

In 33 *C.J.S., Trusts,* sec. 191, it says:

> "If an executor is also designated trustee under a Will he comes into possession as executor, and his election afterward to hold as trustee must be manifested by some plain and unequivocal act."

The rendering of accounts usually shows change of capacity. 24 *C. J., Executors and Administrators,* page 52, note 26. When no bond is required, as is the present case, an executor may change his status to that of trustee by any conduct unequivocally indicating an intention to hold as trustee, or by any other authoritive and notorious act showing change of capacity, and no formal transfer of funds is required. 90 *C.J.S., Trusts,* sec. 241.

In *Board of Education of Chicago v. Crilly,* 312 Ill. App. 16, 37, the court, after calling attention to the fact that the will was admitted to probate 20 years before, and stating that although the executors asserted they performed acts

as executors and not as trustees, it would avail them nothing, said:

> "Where the same persons are named as executors and trustees it will be presumed, after a reasonable time to administer the estate has elapsed, that they have begun to function as trustee."

II. Diversity of citizenship exists between all indispensable parties of the case.

Two facts concerning the case appear to be materially relevant to any determination of diversity between the parties as presently aligned. First is the fact that both Herschel S. Green and MADGE GREEN, aligned as defendants, each claim to individually and personally own a one-third (1/3) undivided interest in 7 and 1/2 eighteenth's of 286 acres of land belonging to the Estate of James A. Green, Deceased, antagonistic to the claims of plaintiffs and respondents who claim only as Trust beneficiaries (Petition for Writ of Certiorari, p. 6, 7; Printed Record on Appeal No. 11124, p. 28, No. 670, October Term 1954, U.S. Supreme Court). Second is the fact that Madge Green, aligned as a party defendant, is not indispensable to the disposition of the case as it pertains to the Estate of Martha Green, Deceased.

Petitioners quote the minority opinion of Circuit Judge Schnackenberg, rendered in the first of their five successive appeals in this case, and indicate his views and those of Circuit Judge Major and Chief Judge Duffy were diametrically opposed in regard to the Court's disposition of the question of diversity of citizenship (Brief p. 16; *Green v. Green*, 218 F. 2d 130, 141). They fail, however, to indicate in any manner whatever that in the second

opinion rendered in this case, although petitioners again raised the question of diversity of citizenship, the decision of the aforesaid learned judges was unanimous (*Green v. Green,* 233 F. 2d 642); and, although petitioners have raised the same question on three additional, successive appeals to the United States Court of Appeals, the position of that court appears unchanged.

Rule 19(a) of the Federal Rules of Civil Procedure, Title 28 USC, deals with what is called the necessary joinder of indispensable parties and gives the court power to bring in all parties needed to fully dispose of the case. It gives the court the power to omit parties not indispensable if by joining them the court would be deprived of jurisdiction of the case. See *Young v. Garrett,* 149 F. 2d 223, 228.

In considering diversity of citizenship in this case, which involves the James A. Green and Martha Green Testamentary Trusts, two distinct and separate estates, it must be kept in mind that Defendant Madge Green has no interest whatsoever as a beneficiary in the James A. Green Trust. The Defendant, Herschel S. Green, a citizen of *Illinois,* and the Plaintiffs, Oscar L. Green, Robert A. Green and Quentin L. Green, all citizens of Texas, are the only parties having any interest whatever in the aforesaid James A. Green Trust.

The original, primary and controlling matter in dispute, concerning both trusts, was the claim of Oscar L. Green that Herschel S. Green, as testamentary trustee, has not paid out the net income of such trusts in equal parts to the named beneficiaries, according to the express provisions of each trust, but wrongfully used his position as trustee to pay himself upwards of $52,000.00, and only $620.00 to Oscar L. Green, his co-beneficiary. (It is now an established

fact that Herschel S. Green paid himself upwards of $76,-838.68 and only $793.74 to Oscar L. Green). Everything in the case was then incidental to this domineering controversy, with respect to which Oscar L. Green and Herschel S. Green are on opposite sides. The original, principal purpose of the suit, the relief demanded was that the court determine and award to Oscar L. Green his just, equal portion of the true net income of both trusts, according to the terms thereof, and that Herschel S. Green be removed as Trustee of the James A. Green Trust.

Herschel S. Green voluntarily resigned as trustee of both aforesaid testamentary trusts, immediately after an initial, preliminary hearing in the District Court on October 27, 1952, and all parties in interest accepted such resignation, and agreed upon a successor trustee from the court subsequently appointed with their express consent. Up to the time such resignation was voluntarily tendered, the District Court did not exercise, or attempt to exercise any jurisdiction whatever to remove Herschel S. Green as trustee of the Martha Green Trust, nor did it, or the plaintiffs claim it had jurisdiction to so do. It would seem peculiar reasoning, under such circumstances, to say an accounting and/or settlement by Herschel S. Green should not follow as a natural course, or that Herschel S. Green is not accountable for all money or property he had in his possession while trustee (*Warner v. Mettler*, 103 N.E. 259, 260 Ill. 416), especially when the subsequent order of the District Court to account was also entered with the consent of all interested parties.

The realignment of Madge Green as a party plaintiff can be justified only if Madge Green is an indispensable party to this suit as it pertains to the Martha Green Trust, and her interest in the subject matter of this suit as it pertains to that trust is of such nature that a final decree

can not be entered which will do justice between the parties before the court without injuriously affecting that interest, or leaving the controversy in such condition that its determination may be wholly inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to the suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court, the suit may proceed without him. See *Atwood v. Rhode Island Hospital Trust Co.*, 275 F. 513, 518, certiorari denied 257 U.S. 661; *Baltimore & Ohio R. Co. v. Chicago River & I.R. Co.*, 170 F. 2d 654, 658, certiorari denied 336 U.S. 944; *Jones v Bryant*, 204 Ill. App. 609, 617.

It is not Petitioner Madge Green, as a named individual, but the widow, if any, of either son, dying without a child or children surviving that is designated as a contingent remainderman in the codicil to the will of Martha Green.

It is readily apparent that the right of Madge Green in the future net income, if any, of the Martha Green Trust, payable to her deceased husband, can not be regarded as a vested right. Madge Green is not the widow of Herschel S. Green, and, it is reasonable to conclude, she may never be his widow. Or, if she does become his widow at some unpredictable time in the future, he may have died leaving a child or children surviving him. The possibility of issue is commensurate with life. Herschel S. Green must not only die first, but he must not die with a child or children surviving him, and there must be a con-

tinuance of the marital relationship now existing between Madge and Herschel.

The interest of Madge Green in the future income of the Martha Green Trust, if any, is plainly a mere intangible, inchoate, contingent expectancy, a speculative, conjectural possibility. Under Illinois law, if there is uncertainty either as to the person who is to receive or in the gift itself to the remainderman, the remainder is contingent. See *Hoblit v. Howser,* 170 N.E. 257, 338 Ill. 328, 332.

Defendant Madge Green has no interest, contingent or otherwise, in any proportionate share of the net income presently payable to Oscar L. Green, or in any recovery by Oscar L. Green of his definite equal share of the net income of the two aforesaid testamentary trusts, as co-beneficiary of Herschel S. Green, the primary purpose of the suit. When a trust is created for several beneficiaries, any one of them can maintain a suit against the trustee to enforce the duties of the trustee to him or to obtain redress for a breach of the trustee's duties to him. *Scott on Trusts* (1939), Vol. 2, sec. 214, p. 1144. It is equally plain that Madge Green has no interest in the removal of Herschel as trustee of the James A. Green Trust, or in any restoration Herschel is required to make to that trust. She has no interest, legal or equitable, in such trust. Defendant Madge Green has no interest in the corpus of the Martha Green Trust. Her contingent interest is only in the future income of such trust. An action for injury to property cannot be maintained by a remainderman having only a contingent interest. *Cummings v. Lohr,* 246 Ill. 577, 581.

Madge Green has consented to the voluntary resignation of Herschel S. Green as Trustee of the Estate of Martha Green, Deceased, and has approved and consented to the appointment of his successor-trustee. She certainly is not in

any position now to complain if an accounting and settlement by Herschel reveals that he has fraudulent, illegally, wrongfully and/or negligently caused the loss of any money or property belonging to the Estate of Martha Green, Deceased.

In essence, the intent of the decree of the Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, was to insure that, in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties the outcome of the litigation in the Federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a State court. See: *Guaranty Trust Co. of N.Y. v. York,* 326 U.S. 99.

A clear distinction is made in Illinois between a present substantial interest and a mere expectancy, or future or contingent interest. The claimant in a proceeding in equity to enforce a trust must show an actual existing interest in the subject matter of the trust.

In *Kingsley v. Montrose Cemetery Co.,* 136 N.E. 685, 304 Ill. App. 273, at 282, the court said:

> "The claimant in a proceeding in equity to enforce a trust must show an actual existing interest in the subject matter of the trust (*McGovern v. McGovern,* 268 Ill. 135). 'If we keep in mind the distinction between a mere conditional future interest in a trust estate generally and present title or interest in the estate, the case is free from difficulty. *Green v. Grant,* 32 N.E. 369, 143 Ill. 61'."

In *Montgomery v. Equitable Life Assur. Society,* 83 F. 2d 758, at 762, the court said:

> "While it is true that all persons who are legally or equitably interested in the subject matter of a suit

must be made parties before they can be bound by the decree, yet the interest contemplated by such rule is always a present substantial interest, as distinct from a mere expectancy or future contingent interest. *McFall v. Kirkpatrick*, 236 Ill. 281 86 N.E. 139; *Green v. Grant*, 143 Ill. 61, 32 N.E. 369. See also *Temple v. Scott*, 143 Ill. 290, 32 N.E. 366."

III. A petition to vacate a judgment, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is addressed to the sound legal discretion of the trial court.

Rule 60(b) Federal Rules of Civil Procedure was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice required that course. Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting time for appeal. *Perrin v. Aluminum Company of America*, 197 F. 2d 254, 255.

In *Independence Lead Mines Co. v. Kingsburg*, 175 F. 2d 983, Cert. denied 70 S. Ct. 249, 338 U.S. 900, at page 988, it is said:

> "It must be remembered that a petition to vacate a judgment is addressed to the sound legal discretion of the trial Court, and its determination will not be disturbed except for abuse of discretion. * * * Particularly is this true in this instance where the experienced judge passing on the petition has provided in the litigation in which the judgment was entered, * * *."

Also see: *Elgin Nat. Watch Co. v. Barrett*, 213 F. 2d 776, 780; and numerous cases in *Federal Digest* Vol. 31D, *Federal Civil Procedure*, sec. 2645.

When discretion is invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily, or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. *Cornwall v. Cornwall,* Dist. of C. 1941, 118 F. 2d 396, 398.

In *Jones v. Jones,* 7 Cir. 1954, 217 F. 2d 239, 241, it was held:

> "Numerous cases support the view that a motion to vacate a judgment under Rule 60(b) is addressed to the sound legal discretion of the court and that its determination will not be disturbed upon appeal except for abuse of discretion."

Defendants-Petitioners make no claim that the denial of their Motion to vacate prior judgments and orders of the District Court, pursuant to said Rule 60(b) (Petition p. 4, 11), was predicated on any abuse of discretion. They do not claim there has been any mistake, inadvertance, surprise, excusable neglect, newly discovered evidence, fraud or misconduct such as might warrant the vacation of a judgment under the provisions of the Rule. Their claim is based on the sole ground that such prior judgments are void because the District Court was without jurisdiction, in view of prior proceedings pending in this cause in the State circuit and county courts of Crawford County, Illinois, and the lack of diversity of citzenship (Petition p. 4, 11). These issues are unquestionably *res judicata* (*Green v. Green,* 218 F. 2d 130, 141, 142, Cert. denied 349 U.S. 917, 948; *Green v. Green,* 233 F. 2d 642, 645).

The District Judge, who passed on their aforesaid motion, and denied it after long and careful consideration and after giving defendants every opportunity to be fully

heard, is well known to be an exceptionally experienced trial judge of upwards of 30 years conscientious State and Federal judicial service, who has presided over the litigation since its very inception and is well acquainted with every fact. Defendants cannot deny that all of the facts and inferences which can be reasonably and naturally drawn from the proceedings had and the evidence therein adduced do not absolutely warrant the judgments and orders entered by the District Court. *Burdick v. Powell Bros. Truck Sales*, 124 F. 2d 694, 695.

Considering the uncontradicted evidence, clearly establishing the truth in this case, the Master in Chancery in his findings of fact and conclusions of law, and the District Court in its judgments and orders have been most charitable with Defendant Herschel S. Green, who has undeniably used his power as testamentary trustee to wrongfully usurp practically all of the net income of the two trust estates, viz: $76,383.68, except $793.74 paid his co-beneficiary, who, by the express provisions of both trusts, is entitled to equal participation in net income thereof.

No principal is more settled than that a trustee will not be allowed to profit out of his administration of a trust, and any relaxation of those equitable rules would leave every trust and every *cestui que* trust at the mercy of a predatory trustee. *First National Bank of Colorado Springs v. McGuire*, 185 F. 2d 620.

Defendants have unquestionably heretofore practiced every artifice conceivable to thwart and defeat the equitable jurisdiction of the District Court, and the clear import of the Opinions of the United States Court of Appeals, whereby Defendant Herschel S. Green is being required

to account for his fraudulent, wrongful acts. Defendants have lately unsuccessfully sought to prostitute the jurisdiction of the State County Court (Appendix hereto, p. 33-35), as they previously did the State Circuit Court by filing completely false and unfounded claims whereby they hoped to unjustly enrich themselves, or escape a just judgment against Defendant Herschel S. Green, until the Illinois Appellate Court for the fourth District reversed that court in all respects (*In re Green,* 8 Ill. App. 2d 264, appeal denied 7 Ill. 2d).

IV. A trust estate may be lawfully required to bear the necessary expenses of its own preservation, including reasonable attorney fees, as were fairly earned in effecting the results indicated by the final decree.

It is a general principle, established by sufficient authority, that a trust estate may be lawfully required to bear the necessary expenses of its own preservation. A court in the exercise of equitable jurisdiction will allow out of the property brought under control of the court, for all expenses properly incurred in the preparation and conduct of the suit necessary to the preservation of any part of it to its proper use, including such reasonable attorney fees as were fairly earned in effecting the result indicated by the final decree. The amount of attorney fees to be allowed is within the judicial discretion of the court, and in fixing that amount the trial court can proceed upon its own knowledge of the value of the attorney's services. *Trustees v. Greenough,* 105 U.S. 527, 532-533; *Illinois Principal and Income Act* (1941) SHA Ch. 30, sec. 14, Part 2; *Poole v. Rutherford,* 336 Ill. App. 516.

Other cases following the same principles are: *U.S. v. Equitable Trust*, 283 U.S. 738, *Lamar v. Hall*, 129 F. 79; *Colley v. Wolcott*, 187 F. 595; *Central Railroad v. Pettus*, 113 U.S. 116, 124.

It is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs between party and party, confined to taxed costs allowed by the fee-bill. The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowances to the parties out of the funds as justice and equity may require. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging and recovering from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usages in their respective states, or may be agreed upon between the parties. *Trustees v. Greenough*, 105 U.S. 527, 533, 535. When an allowance to the complainant is proper on account of solicitor's fees, it may be made directly to the solicitors themselves, without any application by their immediate client. *Central Railroad v. Pettus*, 113 U.S. 116, 124. The fee can be properly charged as a lien on the property with an order for its sale in default of payment. *Colley v. Wolcott*, 187 F. 595.

In *Goohenour v. Cleveland Bldg. Co.*, 142 F. 2d 991, at page 995, it is said:

> "The trial judge is familiar with proceedings in his court and also has expert knowledge as to the val-

> ue of the legal services. He should, therefore, have a broad discretion on the subject since he has a far better means of measuring what is just and reasonable than a appellate court. *Trustees v. Greenough*, 105 U.S. 527. The trial judge stated that the court has personal knowledge and a full understanding of the nature of the problems involved in the litigation here and the character of the services to be rendered by appellees and that the court knew the nature, extent and value of the legal services required and the type of services performed. *May v. Midwest Refining Co.*, 121 F. 2d 431, 440."

In *Pergament v. Kaiser-Frazier Corp.*, 224 F. 2d 80, at page 83, it is said:

> In *Re Detroit International Bridge Co.*, 111 F. 2d 235, we catalogued some of the critera to be taken into consideration in fixing compensation: "The extent and nature of the services; the labor, time and trouble involved; the results achieved; the character and importance of the matter in hand; the value of the property or the amount of money involved; the learning, skill; and experience exercised; whether the fee was absolute or contingent; and the ability to pay. Somewhat similar were the circumstances considered in *Harris v. Chicago Great Western Ry. Co.*, 7 Cir. 197 F. 2d 829, 832. We derive from these cases, and many others examined, that the findings of the District Court should be given great weight.

CONCLUSION

Wherefore, respondents believe that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, on behalf of Herschel S. Green and Madge Green, should be denied, and respondents should be granted such other relief as to this Honorable Court may seem proper.

Dated this 7th day of June, A. D. 1957.

Respectfully submitted,

AUGUST F. BRANDT,
JACKSON R. HUTTON,
Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 1014

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents.

APPENDIX TO RESPONDENTS' BRIEF

State of Illinois
County of Crawford } ss. IN THE COUNTY COURT

IN THE MATTER OF THE ESTATE
OF
MARTHA GREEN, Deceased.

This cause coming on for hearing on the 17th day of May A. D. 1957, before the Honorable John Hollenbeck, Judge

Presiding, on the motion by one of the heirs of the deceased requesting that the claims and amended and supplemental inventories and accounts be stricken or dismissed and on the motion to strike the claim of Herschel Green for services rendered and money advanced sometime after April 9, 1942, and the court having heard the arguments of counsel on said motions and being fully advised in the premises, doth find:

The supplemental inventory of July 16, 1956, is ordered stricken in accordance with the Federal Court decree and the amended inventory filed September 1, 1956 and November 23, 1955 are hereby ordered stricken.

The motion to strike the supplemental inventory filed October 17, 1956 is hereby overruled.

The motion to strike the claim of the executor filed January 11, 1943 will be allowed, and said claim will be disallowed.

The motion to strike the claim of the executor filed August 29, 1956 will be allowed, and said claim will be disallowed.

The reports filed January 28, 1957, December 31, 1956, January 2, 1957, January 8, 1957, January 22, 1957, and the report filed January 28, 1957 will be stricken.

The report filed December 22, 1956 will be stricken.

The eleven reports filed December 22, 1956 covering the period from April 9, 1942 to October 28, 1952 being reports of the operation of the farm lands will be stricken and the executor is ordered within thirty days of the receipt of a copy of the decree to file a report of his receipts and disbursements so far as the assets inventoried on August 25, 1941 and October 17, 1956, exclusive of real estate, are concerned.

The motion of the executor to bring suit against Oscar Green on the claim against him in this estate allowed and a limit of two hundred dollars is hereby fixed as the maximum amount to be spent out of the funds of this estate.

JOHN M. HOLLENBECK
Presiding Judge

(Counsel has verified the fact that the aforesaid, as corrected, is now in accord with the opinion rendered by the court, and the order as prepared by the Reporter will be so amended or corrected)